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IN THE

Supreme Court of the United States

October Term, 1963
No. 1002

MARVIN R. COLE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

	Page
Opinion below	2
Jurisdiction	2
Questions presented	3
Statute involved	4
Statement of the case	4
Argument	15
I.	
The questions are substantial	15
II.	
The decision below creates a conflict between circuits	19
III.	
The questions are important	21
Conclusion	23
Appendix A—Judgment	1
Appendix B—Opinion of the United States Court of Appeals for the Ninth Circuit	2

TABLE OF AUTHORITIES CITED

Cases	Page
Anderson v. United States, 215 F. 2d 84	16
Blau v. United States, 340 U. S. 159	7
Bridges v. California, 314 U. S. 252	10, 18
Broadbent v. United States, 149 F. 2d 580	16
Catrino v. United States, 176 F. 2d 884	16, 21
District of Columbia v. Little 339 U. S. 1	17
Feldman v. United States, 322 U. S. 487	17, 21
Grunewald v. United States, 353 U. S. 391	17, 21
Haili v. United States, 260 F. 2d 744	16
Harrington v. United States, 267 Fed. 97	15, 16
Hashagen v. United States, 283 F. 2d 345	17
Hoffman v. United States 341 U. S. 479	7, 17, 21
Olmstead v. United States, 277 U. S. 438	8
Rosner v. United States, 10 F. 2d 675	1, 3, 14, 16, 19, 20
S.E.C. v. Chenery Corp., 318 U. S. 80	12
Salem Mfg. Co. v. First Amer. F. Ins. Co., 111 F. 2d 797	10
Sampler v. United States, 121 F. 2d 263	21
Shapiro v. United States, 335 U. S. 1	21
Shendal v. United States, 312 F. 2d 564	17
Ullman v. United States, 350 U. S. 422	21
United States v. Constantine, 296 U. S. 287	21
United States v. Courtney, 236 F. 2d 921	17
United States v. Herron, 28 F. 2d 123	14, 17, 20

Page

United States v. Marino, 148 F. Supp. 75 10

United States v. White, 322 U. S. 694 ..... 17, 21

Yankee Network v. Federal Communic. Com., 107 F. 2d 212 15

Statutes

Act of June 25, 1948, Ch. 645, 62 Stat., p. 769 4

Act of March 2, 1831, 4 Stat. pp. 487, 488 18

United States Code, Title 18, Section 1503 ..... 1, 2, 3, 4, 15, 16, 18, 21

United States Code Annotated, Title 18, Sec. 3231 2

United States Code Annotated, Title 28, Sec. 1254 (1) 2

United States Constitution, Fifth Amendment 3, 6, 9, 10, 21, 22

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner Marvin R. Cole, defendant and appellant below, respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit [annexed to this petition as Appendix "A"] affirming a judgment of the United States District Court for the Southern District of California, that determined petitioner was guilty of a violation of section 1503 of Title 18 of the United States Code, *i.e.*, of the offense popularly but inaccurately referred to as obstruction of justice.[1]

[1] A more accurate description of the offense is obstructing the *due* administration of justice. [See, *Rosner v. United States*, 2 Cir., 10 F.2d 675, 676.]

Opinion Below.

The opinion of the Court of Appeals has not yet been reported. It is printed in Appendix "B" to this petition. There was no opinion in the District Court.

Jurisdiction.

1. The date of the judgment sought to be reviewed is, and it was entered in the Court of Appeals on March 16, 1964. There was no petition for a rehearing.

2. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question is 28 U.S.C.A., §1254(1).

3. The basis of the District Court's jurisdiction is that this was the trial of an indictment returned by a Federal grand jury charging an offense against the laws of the United States, *i.e.*, a violation of section 1503 of Title 18 of the United States Code. The statutory provision sustaining the jurisdiction of the District Court is 18 U.S.C.A., §3231.

4. The grounds upon which the jurisdiction of this Court is invoked are that the Court of Appeals in affirming has decided a novel and important question of law arising under the criminal laws of the United States, which has not been but should be settled by this Court; and has rendered a decision on another of the questions here involved in conflict with the decision of another Court of Appeals on the same matter.

Questions Presented.

1. When a witness before a Federal grand jury lawfully claims the privilege against self-incrimination conferred upon him by the Fifth Amendment to the Constitution of the United States, is one who advised him to claim it guilty of corruptly endeavoring to influence, obstruct or impede the due administration of justice, or to influence, intimidate, or impede the witness, within the meaning of 18 U.S.C.A. § 1503 simply because of the motive that may have impelled the advice or the manner in which the advice was given?

2. When neither the purpose nor the result of such advice is to bring about any obstruction of the due administration of justice or any disregard or defiance of the duties or responsibilities of the witness as a witness, is the statute violated merely because the advice was given in the self-interest of the advisor or was accompanied by threats? In other words, is section 1503 aimed solely at the result of, or endeavor to bring about, an obstruction of the due administration of justice, or does it proscribe, as well, regardless of actual or intended effect upon the due administration of justice, the means of or motive for such an endeavor?

3. Does one unlawfully influence a potential grand jury witness by the advice that the witness need not or should not appear before the jury, the potential witness not being then under any compulsory process or other legal duty to appear; and does the decision below in that regard conflict with a decision of the Court of Appeals for the Second Circuit [*Rosner v. United States*, *supra*, 10 F. 2d 675] upon the same matter?

Statute Involved.

The statute involved is section 1503 of Title 18, United States Code [Act of June 25, 1948, c. 645, 62 Stat. 769.]. So far as material here, it reads as follows:

> "Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror . . . or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Statement of the Case.

1. *The Indictment.*[2] Marvin Cole, the defendant and appellant below, was charged in two counts. The first was that on or about May 30, 1952 he corruptly influenced, obstructed, and impeded and endeavored to influence the due administration of justice by corruptly endeavoring to influence, intimidate and impede and influencing, intimidating and impeding Joel R. Benton,

[2] The record in the Court of Appeals was typewritten. It consists of two parts. One of them, designated "Volume I" contains the indictment, judgment of the District Court, and other of the papers in the District Court record. It is referred to here by the abbreviation "R" followed by the number of the page being referred to. The other part, Volume II, consists of eight volumes of the Reporter's Transcript of the trial in the District Court. It is referred to here by the abbreviation "Rep. Tr." followed by the page and line numbers of the part to which the reference relates.

who was a witness before the Federal Grand Jury empaneled in September, 1961. [R. 1]. The second count is similar except that it includes threats; the date of the offense is October 9, 1962; and the grand jury was the one empaneled in February, 1962. [R. 2]

2. *The Evidence.*[3] Benton had been an employee and was a friend of Cole. [Rep. Tr., p. 140, lines 14-16; p. 142, lines 20-22; p. 276, line 2, to p. 277, line 8; p. 378, line 1, to p. 380, line 10; p. 385, line 12, to p. 387, line 3; p. 512, line 5, to p. 514, line 12.] In 1958, Benton had submitted a perjurious affidavit to the Senate Select Committee On Improper Activities, relating to some checks of the Teamsters Union, purportedly but not in fact, issued as payment for services assertedly but not actually rendered by him. [Rep. Tr., p. 35, lines 9-14; p. 73, lines 10-15; p. 94, lines 17-22; p. 95, lines 12-14; p. 155, line 18, to p. 158, line 23; p. 161, line 7, to p. 163, line 17; p. 284, line 15, to p. 285, line 9; p. 313, lines 8-23; p. 315, line 4, to p. 321, line 7; p. 330, line 15, to p. 330, line 5; p. 342, line 1, to p. 353, line 13; p. 354, line 4, to p. 362, line 16; p. 521, lines 1-21.]

[3]For the purpose of this petition it is not necessary to narrate the evidence (covering over 200 pages of transcript) with the detail that will be required for a consideration of the substantive merits of the questions presented. We do, however, summarize enough of the evidence to put those questions in their proper context and to permit a fair appraisal of their nature and importance. In doing so, we present the evidence in its strongest conceivable interpretation *against* the petitioner. We do so in order that the determinative question in the case—the true scope and meaning of the statute involved—may be squarely faced. In point of fact, a fair reading of the testimony, due regard being had for the context in which it is found and the evident intentions of the respective witnesses, does not require any such harsh interpretation. That, however, is a matter for the merits, and need not be further pursued at this stage of the proceeding.

In May of 1962 Benton was asked over the telephone, by an Assistant United States Attorney in Los Angeles, California, to come down and answer a few questions before a Federal grand jury then sitting.[4] Benton reported this request to Cole and asked for advice. [Rep. Tr., p. 148, line 4, to p. 151, line 12.] He was frightened at the prospect of being questioned—obviously because if questioned about his affidavit he would have either to repeat his previous perjury or confess it. He was planning to stand on his previous averments. [Rep. Tr., p. 193, line 13 to p. 194, line 23; to p. 198, lines 11-15; p. 94, line 17, to p. 96, line 25; p. 71, lines 5-7; p. 429, lines 9-25; p. 440, lines 3-7; p. 521, lines 1-9; p. 540, line 12, to p. 541, line 7.]

Benton and Cole had a number of discussions regarding the former's conduct before the grand jury. The upshot of these discussions was that Cole told Benton that he (Benton) had "the right to take the Fifth, that he [could] not be compelled to be a witness against himself;" that he "must" take it; that "all he had to do was to go down and take the Fifth Amendment and everything would be all right." [Rep. Tr., p. 71, lines 8-13; p. 78, lines 2-3; p. 97, lines 15-24; p. 153, line 23, to p. 155, line 15; p. 176, lines 17-25; p. 181, lines 3-15; p. 394, lines 2-17; p. 521, lines 22-25; p. 522, line 17, to p. 523, line 4.]

At the same time Cole suggested consultation with a lawyer. One was had with Benton's lawyer, who first expressed disagreement with Cole's advice. Ultimately,

[4]Benton was not subpoenaed to appear until after Cole had given him the advice that brought about the instant prosecution. [Rep. Tr., p. 148, lines 1-7; p. 149, line 17, to p. 150, line 2; p. 433, line 3, to p. 434, line 9.]

however, he concurred in it, although with some later-professed reluctance. Everybody then agreed that Benton would claim his privilege. [Rep. Tr., p. 71, line 8, to p. 72, line 12; p. 73, lines 2-3; p. 75, line 1, to p. 76, line 19; p. 79, lines 19-25; p. 97, line 15, to p. 99, line 12; p. 153, line 23, to p. 155, line 15; p. 176, line 17, to p. 179, line 17; p. 187, line 2, to p. 193, line 12; p. 392, line 2, to p. 395, line 19; p. 433, lines 14-19; p. 521, line 22, to p. 524, line 6; p. 526, line 1, to p. 529, line 13.] On June 7, 1962, Benton appeared before the grand jury and, on the ground of possible self-incrimination, refused to answer the questions put to him.[7] [Rep. Tr. p. 81, line 23, to p. 82, line 7; p. 135, line 16, to p. 137, line 22; p. 222, lines 9-25; p. 255, line 16, to p. 256, line 6; p. 266, lines 1-23.] After Benton had appeared, Cole offered to pay the $100 that Benton's lawyer had charged him. Benton first refused and later (after having turned informer) accepted this offer. [Rep. Tr., p. 79, line 17, to p. 80, line 2; p. 80, line 24, to p. 82, line 15; p. 277, line 2, to p. 231, line 20; p. 232, lines 16-22; p. 396, line 23, to p. 397, line 12; p. 534, lines 1-25.]

There was testimony that when Benton first communicated with Cole about his projected appearance before the grand jury, Cole suggested that he take a vacation out of town. [Rep. Tr., p. 232, line 23, to p.

[7] The questions did not on their face relate to Benton's perjurious affidavit. By the same token they did not negate the possibility that they were preliminary to, or might furnish a connecting link with, that subject. [See, *Hoffman v. United States*, 341 U. S. 479, 486; *Blau v. United States*, 340 U. S. 159, 161.] In any event, it has never been claimed that Benton's invocation of the privilege was not properly grounded or lawfully claimed. Indeed, it seems to have been conceded below by the prosecution that the claim was a lawful or proper one.

233, line 20.] It is clear that this incident took place, if at all, before Benton was subpoenaed, and at a time when all that he had gotten was a telephonic request to appear.[6] [Rep. Tr., p. 233, lines 11-13.]

After Benton's grand jury appearance, he sought and was given an interview with the Assistant United States Attorney who had called him. In this interview he confessed his previous perjury; asked for and apparently was promised, what the government calls "physical protection;" and thereafter, without Cole's knowledge, cooperated with the government in a persistent and obvious effort to trap Cole into saying or doing something inculpatory.[7] [Rep. Tr., p. 234, lines 13-20; p. 236, lines 14-20; p. 240, lines 1-11; p. 243, lines 1-3; p. 396, line 14, to p. 398, line 8; p. 399, line 2, to p. 400, line 20; p. 403, lines 5-10; p. 405, lines 13-17; p. 406, line 18 to p. 409, line 24; p. 412, line 12, to p. 417, line 12; p. 535, lines 7-14; p. 541, line 12, to p.

[6] It is, however, far from clear in the record whether, at the time Cole is said to have made the suggestion, he knew any more than that Benton had received a telephone message to call a named Assistant United States Attorney. There is ample basis in the record for the conclusion that at the time of Cole's suggestion, Benton had not returned the call from the Assistant United States Attorney, and so, did not know and could not have told Cole that he had been or would be asked to appear as a grand jury witness. [Rep. Tr., p. 148, line 1, to p. 151, line 14; p. 153, line 10, to p. 156, line 11; p. 176, line 7, to p. 177, line 17. But see, Rep. Tr., p. 231, line 11, to p. 232, line 25; p. 233, lines 1-10; with which compare, Rep. Tr., p. 149, lines 8-16; p. 150, line 3, to p. 151, line 12, and R. 58-59.] For the purpose of this petition, we take the reading that bears most strongly against petitioner; and so we assume that when Cole made the suggestion in question, he knew that Benton had been telephonically asked and had agreed to appear before the grand jury.

[7] The effort at trapping was carried on by means of electronic snooping devices and similar methods, reminiscent of the sort of thing that Mr. Justice Holmes, dissenting, in *Olmstead v. United States*, 277 U. S. 438, 470, characterized as "dirty business."

542, line 6; p. 99, lines 13-20; p. 621, line 14, to p. 625, line 13; to p. 631, lines 13-17.]

A second grand jury appearance for Benton was arranged. At government instigation, he called Cole, professing to want further consultation and advice. This call resulted in a number of meetings—electronically snooped, or, on one occasion, with a government agent lurking in the vicinity in a position to hear what was said.* Once again, in these meetings, the discussion centered around Benton's perjurious affidavit. Benton professed to be nervous about it. He also professed a desire to stand on his earlier affidavit. Cole told him that this was Benton's personal problem and he (Cole) couldn't influence him. Cole also told him that if he stood on his affidavit he would only perjure himself again or incriminate himself; the only way he could get into trouble would be to testify; he had the right to plead the Fifth Amendment; and it was best that he do so, but he should consult and be guided by the advice of a competent lawyer. [Rep. Tr., p. 34, line 14, to p. 36, line 16; p. 37, lines 3-14; p. 38, lines 17-23; p. 50, line 2, to p. 22, line 9; p. 58, line 1, to p. 59, line 15; p. 63, line 15, to p. 65, line 15; p. 77, lines 1-8; p. 95, line 25, to p. 96, line 25; p. 99, lines 13-20; p. 100, lines 2-8; p. 100, line 24, to p. 102, line 19; p. 107, line 23, to p. 108, line 19; p. 240, line 23, to p. 249, line 23; p. 251, line 17, to p. 255, line 2; p. 260, lines 4-17; p. 269, line 8, to p. 270, line 2; p. 399, line 2, to p. 400, line 20; p. 402, lines 9-22; p. 403, lines 5-10; p. 405, lines 13-17; p. 406, line 18, to p. 409, line 24; p. 412, line 12, to p. 417, line 12; p. 538, lines 1-24; p. 540, line 3, to p. 557, line 10;

*The government did not produce this agent as a witness.

p. 623, line 1, to p. 625, line 13.] He appeared at the appointed time and testified. [Rep. Tr., p. 81, line 23, to p. 82, line 7; p. 135, line 10, to p. 137, line 22; p. 223, lines 9-25; p. 260, lines 7-23.]

During these discussions, Benton several times brought up his concern that a Fifth Amendment plea might lead his employer to think that something was wrong, with a resulting loss of employment. Cole's reply to Benton on these occasions is the basis of the prosecution's contention that Benton's self-incrimination plea was induced by threats. What Cole said on this subject was that Benton need not be nervous; it was no crime to take the Fifth, but if his boss was going to be unreasonable he (Cole) knew someone who was close to the boss, who would talk to him and whose opinion the boss would respect. On the other hand, if Benton testified and as a consequence was forced to spend a lot of time in court, he was sure to lose his job; he would be very foolish not to take the Fifth; if he kept his mouth shut he would be okay; if he didn't he would surely lose his job, and even if he didn't care about himself, he had a lovely wife and family and wouldn't want anything to happen to them, as Hoffa's boys were mighty rough." [Rep. Tr. p. 153, line 23, to p. 154.[9]

[9]Here, too, for purposes of this petition we take that interpretation of the testimony that militates most strongly against Cole. On the merits, however, and when read in context, the testimony in question does not show any threats, but only a statement or prediction by Cole that incrimination would be more likely to cause Benton's employer to discharge him than would a claim of the privilege; and also that, as incrimination would involve the Teamsters Union in an unsavory perjury incident, retaliation from that quarter was something that could be expected. The element necessary to make these statements a threat—the avowed present intention or determination to inflict harm—is absent. [See, *Salem Mfg. Co. v. First Amer. F. Ins. Co.*, 9 Cir., 111 F. 2d 797, 804; *United States v. Marino*, N. D. Ill., 148 F. Supp. 75, 76, 77. Cf., *Bridges v. California* 314 U. S. 252, 277.]

line 15; p. 155, line 15, to p. 156, line 11; p. 245, lines 10-24; p. 260, line 18, to p. 261, line 1; p. 37, lines 3-14; p. 53, lines 1-23; p. 267, line 7, to p. 272, line 18; p. 545, line 10, to p. 546, line 6; p. 599, line 22, to p. 600, line 3; p. 609, line 23, to p. 610, line 5; p. 615, lines 14-16; p. 627, lines 13-21; p. 632, line 20, to p. 633, line 2; p. 642, line 3, to p. 643, line 21; p. 655, line 11, to p. 656, line 1; p. 657, lines 1-20.]

It was also strongly contended below by the prosecution that Cole's advice to Benton was motivated by self-interest, by a desire to protect himself rather than Benton. Neither the contention, nor the record, identifies the dire consequence against which that protection was sought. Nonetheless, for the purposes of our argument in this petition, we assume the factual validity of the contention.[10] The trial judge was of the view that "[t]here is no evidence that this advice was made for the purpose of protecting Cole." [Rep. Tr. p. 1015, lines 2-3. See also note 12, *infra*.]

[10] That assumption is enough to put the questions here presented, and the view of the Court of Appeals on them, in appropriate context. Because of it, and because the Court of Appeals accepted the contention at least in substantial part, and based its decision on it, it will be unnecessary to extend an already long recital of evidence with a detailed summary of the testimony from which the contention is sought to be derived. In brief, the gist of that testimony is that Cole was the subject of a grand jury investigation—a fact of which he was told, but not until two months after he had advised Benton to claim and Benton had claimed the Fifth Amendment privilege [Rep. Tr., p. 138, lines 6-16; p. 148, line 1, to p. 155, line 12]; he knew and sometimes met socially one Joseph Stacher, who was also the subject of a grand jury investigation [Rep. Tr., p. 83, lines 1-8, p. 212, line 7, to p. 213, line 20; p. 486, line 19, to p. 487, line 13; p. 557, line 23, to p. 558, line 17; p. 564, line 9, to p. 567, line 4]; he knew casually, but disliked one Nate Stein, the man who had suborned Benton's perjury [Rep. Tr., p. 280, lines 9-20; p. 506, line 22, to p. 508, line 24; p. 580, line 7, to p. 583, line 13] he was said to have advised a number of his employees who had been sub-

3. *The Theories of the Courts Below.* The trial judge obviously placed no stock in any theory of ulterior motive or self-interest;[11] nor in the theory of threats.[12] On the other hand he was satisfied that there was nothing criminal about advising a witness to claim his self-incrimination privilege. [Rep. Tr., p. 455, lines 13-23; p. 923, lines 13-23; p. 925, lines 15-21.] But, he felt, when one crossed over from advice or suggestion to "insistence," the field of criminality was reached. [Rep. Tr., p. 455, lines 9-14; p. 473, lines 12-18; p. 931, line 20, to p. 933, line 14.] And so, the jury were told that if Cole went "too far, if he went over this imaginary line" between advice and insistence, he could be guilty of obstructing or impeding the due administration of justice.[13] [Rep. Tr., p. 933, lines 2-14; p. 934, lines 6-12; p. 935, lines 5-12.]

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poenaed before a grand jury to claim the self-incrimination privilege [Rep. Tr., p. 260, line 6, to p. 262, line 18]; he is supposed at one time to have said that Stacher was the No. 2 man in the "syndicate" and he (Cole) was his "boy" [Rep. Tr., p. 217, lines 5-12]; and he was interested in learning from Benton what he had been asked before the grand jury and what his lawyer had talked about at that time with one of the government attorneys. [Rep. Tr., p. 228, line 8, to p. 230, line 8.]

[11]Indeed, that theory was not advanced by the prosecution until the case was well along in the Court of Appeals, except in one casual remark about motive in the abstract [Rep. Tr., p. 755, lines 11-24] buried in the midst of a long and detailed jury argument on other matters. [See, Rep. Tr., pp. 696-759; 872-907.] Accordingly, the trial jury were told nothing about it in the charge given them, although they were told about the specific intent that was an element of the crime charged. Nor finding on the subject, therefore, can be deemed to have been made, and an "appellate court cannot take the place of the jury." [*S.E.C. v. Chenery Corp.*, 318 U.S. 80, 88.]

[12]The trial judge told the jury that the "only thing that the defendant did, as far as I can ascertain, is to suggest or urge or implore or demand that Joel R. Benton take the Fifth Amendment . . ." [Rep. Tr., p. 932, lines 9-20.]

[13]The judge could not, however, locate this line for the jury; and he compounded that lack of guidance by frankly confessing

The judge developed his notion of "insistence" as a crime, early in the trial [Rep. Tr., p. 193, lines 9-13; p. 194, lines 22-25]; and thereafter, eagerly seconded by prosecuting counsel when they sensed the judge's predilection for the theory, he clung to it tenaciously. [Rep. Tr., p. 199, lines 13-20; p. 224, line 1, to p. 226, line 6; p. 435, line 10, to p. 436, line 13; p. 455, lines 9-14; p. 458, line 1, to p. 459, line 18; p. 473, lines 12-18; p. 528, lines 20-21; p. 666, lines 1-12; p. 906, line 6, to p. 907, line 13.] While expressing regret that Cole had to be a "guinea pig" [sic] he was of the view that the question of law posed by Cole's motion for acquittal was an important one that ought "to be resolved by the Circuit," which could not be done if the motion were granted, "as the government would not be able to appeal . . ." [Rep. Tr., p. 944, lines 11-12; p. 1026, lines 11-17.]

The Court of Appeals paid scant attention to the insistence theory. It did, however, adopt the prosecution's belated theory of self-interest, as well as the theory that the evidence supported a finding of the use of threats. Nevertheless, the Court agreed with us that a lawful claim of the self-incrimination privilege would not be an obstruction of the due administration of justice, regardless of the witness's motive or reason for making the claim. So, too, it agreed that advising a witness to claim the privilege would not be such an obstruction or an unlawful influencing of the witness. But, the Court argued, when the advice was accom-

his inability to tell whether Cole had a right to be insistent. He said, "Cole had the right to suggest, he even had the right to argue . . . . But did he have the right to insist? *I don't know.*" [Rep. Tr., p. 935, lines 5-12. Italics ours.]

panied by threats or was given in the self-interest of the advisor, the crime had been committed. So holding, it affirmed the judgment of conviction. [App. "B," *infra*, pp. 5-6, 7-8, 14.]

On the question of the alleged suggestion to Benton to take a vacation, the Court of Appeals merely stated dogmatically that while the holding in *Rosner v. United States*, *supra*, 10 F. 2d 675, "may well be sound law, [it] has no applicability here." [App. "B," *infra*, p. 10.] What made the decision inapplicable was not pointed out.

In *United States v. Herron*, N. D. Cal., 28 F. 2d 123, the facts were similar to ours as the Court of Appeals noted; and the decision was that it was not a crime to advise a witness to claim the self-incrimination privilege, even if the advice was given for an ulterior or self-serving motive. That case, the Court of Appeals said, was "directly in point" but was "not binding on this court, and we refuse to follow it . . ." [App. "B," *infra*, pp. 10-12.]

ARGUMENT.

I

The Questions Are Substantial.

This Court has not heretofore had the occasion to determine whether the statute relating to obstruction of the due administration of justice is to be given literal and unbending effect or whether implicit within it are limitations that must be heeded to prevent it from being so applied as to burke considerations of public policy that are as important as that of keeping justice undefiled. The instant case furnishes such an occasion, of which advantage should be taken.

The statute broadly defines two types of conduct at which it is aimed: (1) endeavoring to influence, intimidate, or impede a witness; and, (2) influencing, impeding or obstructing or endeavoring to influence, impede or obstruct the due administration of justice. [18 U.S.C.A., § 1503.] That broad language cannot be given literal application, for to do so would "impute to Congress an intent to produce an absurd result." [*Yankee Network v. Federal Communic. Com.*, App. D.C., 107 F.2d 212, 219, and cases there cited in footnote 34.] For instance, no one would deny that it would not be a crime, in respect of a witness determined or inclined not to tell the truth, to influence him by suggesting, or even insisting, that he should abide by his oath to tell "the truth, the whole truth, and nothing but the truth." [See, *Harrington v. United States*, 8 Cir., 267 Fed. 97, holding it not an obstruction of justice to endeavor to persuade a witness to change testimony believed by the persuader to have departed from the truth, even though the endeavor was

obviously made in the self-interest of the defendant.] Yet, if section 1503 is to be read literally, such an endeavor would be a crime, for it is an effort to "influence" the witness.[14]

What is shown by this and the other examples touched upon in footnote 14 is that the statute must have a limitation upon its broad language. The statute aims at preserving and protecting the due "administration of *justice*," which means "the performance of acts or duties required by the *law*. . ." [*Rosner v. United States, supra,* 10 F.2d at 676, Court's italics.] In short, it hits at "conduct designed to interfere with the process of arriving at an appropriate judgment in a pending case and which would disturb the orderly and proper functions of the court . . ." [*Haili v. United States*, 9 Cir., 260 F.2d 744, 745-746. See, also, *Broadbent v. United States*, 10 Cir., 149 F.2d 580, 581; *Catrino v. United States*, 9 Cir., 176 F.2d 884, 887; *Anderson v. United States*, 6 Cir., 215 F.2d 84, 88; *Harrington v. United States, supra,* 267 Fed. at 101.] From this, it is readily deducible that what is proscribed by the statute is conduct that produces, or is intended to produce, some act by a witness that is

[14]Other examples of the absurdity of a literal reading of section 1503 come readily to mind. For example, an endeavor, including even forcible restraint, to prevent the departure of a subpoenaed witness bent on fleeing to avoid testifying; legitimate argument in open court addressed to judge or jury in an endeavor to influence a ruling or verdict in favor of the one making the argument; advising a witness in open court that some testimonial privilege, such as lawyer-client, doctor-patient, priest-penitent, or husband-wife, entitles him to refuse to answer a pending relevant and material question; objecting to a question put to a witness on some ground of incompetency, such as hearsay, parol evidence, not the best evidence, or the like; attempting to persuade a possible witness beyond the range of the court's subpoena-power to appear voluntarily to testify.

contrary to the witness's duties as a witness, or some act that will bring about something less or other than a *due* administration of justice. [*Cf. District of Columbia v. Little*, 339 U.S. 1, 5-6.]

When a witness properly claims his Fifth Amendment privilege not to testify against himself, he violates no duty of a witness. Nor does he obstruct or impede the due administration of justice. The privilege is designed "to protect *innocent* men" [*Grunewald v. United States*, 353 U.S. 391, 421. Court's italics]; and it is "firmly embedded in our constitutional and legal framework . . ." [*United States v. White*, 322 U.S. 694, 699.] It is, therefore, an integral part of, not an obstruction or impediment to, the due administration of justice. [See, *Hoffman v. United States*, *supra*, 341 U.S. at 486; *Feldman v. United States*, 322 U.S. 487, 489; *Hashagen v. United States*, 9 Cir., 283 F.2d 345, 348.]

Accordingly, to claim it is not and cannot be an obstruction of justice. [*United States v. Herron*, *supra*, 28 F.2d at 123] That is so regardless of the motive that may have impelled the witness to claim it [*United States v. Courtney*, 2 Cir., 236 F.2d 921, 923; *United States v. Herron*, *supra*, 28 F.2d at 123]; and it is so even if the motive is protection of someone other than the witness. [*Shendal v. United States*, 9 Cir., 312 F.2d 564, 565.] Thus, it logically follows that advising one to claim the privilege is not and cannot be an obstruction of justice. The actual or intended result of such advice is not itself an obstruction; and so the advice is not.

To this point of our argument the Court of Appeals was in agreement with us. Its divergence from the

conclusion just stated was based on the premise that Cole's advice was given for an ulterior or self-serving motive and was accompanied by threats. [App. "B," *infra*, pp. 5-6, 7-8, 14.] That reasoning presupposes that the statute does more than proscribe only the result, or the endeavor to bring about the result, of unduly obstructing justice or influencing a witness to do something that is a violation of his duties as a witness. It assumes that the means of such an endeavor by themselves, and apart from any actual or intended deleterious effect upon the administration of justice, were the object of the congressional prohibition.

That assumption is patently an unrealistic one. Personal conduct, stripped of direct connection or involvement in some *federal* objective which the Congress desires to further, has never been, historically or constitutionally, the object of federal legislation. It is, we respectfully suggest, a bold and untenable proposition that in enacting the original statute [Act of March 2, 1831, 4 Stat. 487, 488] of which section 1503 is the lineal descendant, the Congress was concerned with threatening or ulterior conduct by itself and regardless of its actual or intended effect on the due administration of justice. Actually, the statute was enacted originally to deal in a plenary rather than summary way with acts of the sort that were contempts of court, *i.e.*, direct obstructions, and which were punished summarily and often too harshly. [See *Bridges v. California*, 314 U.S. 252, 287-289.] Effect on the administration of justice, not means, was its objective.

If, as the Court of Appeals agreed, it is not an obstruction of justice, or an improper act on the part of a witness, to claim the constitutional privilege

against self-incrimination, it cannot be a crime to bring about or endeavor to bring about that non-obstructive result, whatever the means of the endeavor may be. If the statute is concerned with the result, rather than the means, it cannot be of any legal significance that the means are improper, so long as the result effectuated or endeavored to be effectuated is not the one forbidden by the statute. Certainly, the question whether under this statute criminality can inhere in the means, regardless of result, is a substantial one; and, for the reasons of importance to which we will come in a moment, it is a question which ought to be decided by this Court.

II

The Decision Below Creates a Conflict Between Circuits.

In *Rosner v. United States*, *supra*, 10 F. 2d 675, one Miller, who was a defendant in a criminal case, was sent a written notice by a United States attorney to appear in court on a given day to plead to the information against him. Rosner told Miller not to appear but to give him (Rosner) $150 with which he would fix the matter with the United States Attorney's office. Rosner's conviction of corruptly influencing and obstructing the due administration of justice was reversed by the Court of Appeals for the Second Circuit, notwithstanding the corruptness of the means.[15] The reasoning that led to this result was this: The administration of justice imports performance of acts or duties required by law. The request to appear made by the United States attorney was not process, and imposed no

[15] The Court below incorrectly referred to *Rosner* as having been decided by the *Third* Circuit. [See "B," *infra*, p. 10.]

more of a duty on Miller to appear than would have been imposed by an oral request. "[S]ince a disregard by Miller of an oral request by the United States attorney would not have been obstructing the administration of justice, . . . so advising Miller to disregard substantially the same request is not a violation of the statute." [10 F. 2d at 676.]

In the case at bar we have virtually an identical set of facts. Benton had been orally requested by a United States attorney to appear before the grand jury to testify. He had not been served with any process or order obligating him in law to appear. Cole, *ex hypothesi*, told him to disregard the oral request. Nonetheless, and despite *Rosner v. United States*, *supra*, 10 F. 2d 675, the court below held that the administration of justice had been obstructed.

That conflict with *Rosner* is direct and irreconcilable. Certainly it is not reconciled by the uninformative statement below that *Rosner* "has no applicability here." [App. "B," *infra*, p. 10.] The slight factual differences between the two cases are irrelevant to the *rationale* of the decision. In *Rosner*, the person influenced was a defendant, rather than a witness as at bar; and the request to appear was written, rather than oral as in our case. The important and relevant facts, however, are identical—*i.e.*, in both cases, the person influenced was under no legal duty to appear; and in both, the person accused of obstructing justice advised the other not to appear. The two decisions are not reconcilable. The conflict between them should be resolved by this Court.

Admittedly, the decision below is in direct conflict with *United States v. Herron*, *supra*, 28 F. 2d 122. [App.

"B", *infra*, pp. 10-12.] That fact at least adds importance to the question. [See *United States v. Constantine*, 296 U.S. 287, 290; *Shapiro v. United States*, 335 U.S. 1, 4.].

III

The Questions Are Important.

As several courts have observed, section 1503 is an important statute because its basic aim is to preserve the purity of justice. [*e.g.*, *Catrino v. United States*, *supra*, 176 F. 2d at 887; *Sampler v. United States*, 5 Cir., 121 F. 2d 263, 265.] It is, therefore, a matter of substantial consequence that the statute be correctly interpreted and applied, and that it be confined to its implicit limits. Not so confined, it defeats the great public purpose it was intended to subserve; for then, it may be used to strike down conduct that is not an obstruction, but is actually in furtherance, of the due administration of justice. [See, *e.g.*, note 14, *supra*, and the text thereby footnoted.]

Second: The self-incrimination privilege of the Fifth Amendment can no longer be downgraded or treated as an anachronistic survival that is unsuited to modern conditions. This Court has spoken too often and eloquently on the subject to admit of any such denigration of the privilege. [See, *Grunewald v. United States*, 353 U.S. 391, 426, per Black, J., concurring; *United States v. White*, *supra*, 322 U.S. at 699; *Hoffman v. United States*, *supra*, 341 U.S. at 486; *Feldman v. United States*, *supra*, 322 U.S. at 498; *Ullman v. United States*, 350 U.S. 422, 426-429.] It is important that the privilege not be eroded or that resort to it not be unduly deterred. Such resort is frequently a matter requiring, or making advisable, consultation with others. The

giving of advice in respect of it ought to be frank and uninhibited. It should not be deterred by any fear that investigation into motives and means may result in criminal prosecution of the adyisor. Deterrence of the advisor is in effect deterrence of lawful resort to the privilege. In that way it is an erosion of the privilege itself. A privilege, use of which is deterred when use of it would be proper, is little different from no privilege at all.

Third: The statute does not create a special class of persons to whom it applies. It applies to all—lawyers as well as laymen. Conduct that is unlawful if performed by a layman is just as unlawful if performed by a lawyer. Advice to claim the self-incrimination privilege is most often given by lawyers. Is the giving of professional advice on that subject now to be deterred by fear of investigations into motives, with possible penal consequences if there should be turned up evidence, believed by a jury, of a self-serving motive? Not all lawyers have the fortitude or the moral courage of an Otis or Brougham or Erskine. Is the giving of forthright advice about a Fifth Amendment plea to be hereafter the prerogative of only the most courageous members of the Bar? These are questions that inevitably come to mind after assimilating the rationale of the decision below in the instant case. They are serious questions, important to an independent Bar and, because of the Bar's place in the administration of justice, to the public. They should be resolved by an authoritative interpretation of the statute by this Court.

The stark fact about this case is that because a witness claimed his constitutional privilege against self-incrimination the man who instigated that claim has

been convicted of obstructing justice. That result, despite the lower court's rationalization of it, is so pregnant with erosive effects upon the due administration of justice and upon the privilege as an important part of that administration, as to warrant plenary examination at the highest judicial level.

Conclusion.

A writ of certiorari to the Court of Appeals for the Ninth Circuit should be issued, to the end that its judgment in the instant cause may be reviewed.

Respectfully submitted:

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APPENDIX "A"

Judgment

United States Court of Appeals, for the Ninth Circuit.

Marvin R. Cole, Appellant, vs. United States of America, Appellee. No. 18807.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

APPENDIX "B"

Opinion of the United States Court of Appeals for the Ninth Circuit

Before: Barnes, Merrill and Koelsch, Circuit Judges

Barnes, Circuit Judge:

An indictment in two counts was found by a grand jury charging appellant Marvin R. Cole with obstructing the due administration of justice, made a crime by 18 U.S.C. § 1503.

That section reads as follows:

> "Influencing or injuring officer, juror or witness generally;
>
> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States Commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any

such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Count I charges appellant with "corruptly" endeavoring "to influence, intimidate and impede" one Joel R. Benton (who was a witness before a certain grand jury investigation) in connection with certain testimony he might give, and Count II charges appellant with "corruptly and by threats" endeavoring "to influence, intimidate and impede" the same Benton (a witness before a second grand jury) in connection with certain testimony he might give.

Cole was found guilty by a jury on both counts. Appellant was fined $1,000 on each count concurrently, or a total fine of $1,000.

To understand appellant's theory, we quote from the "Introductory Statement" appearing in appellant's brief:

> "Joel R. Benton was a friend and former employee of Cole. Benton had been orally requested to appear before a Federal grand jury. He was, however, deeply concerned and frightened over the prospect of such an appearance because he had executed and filed with a committee of the United States Senate, the so-called McClellan Committee, a false statement and affidavit. He came to Cole for advice, telling him about this perjury and of

his intention simply to stand on the false statement, thus in effect repeating the perjury, before the grand jury. Cole advised Benton against this obviously improper course, and offered as the solution of Benton's problem the suggestion that he claim his constitutional privilege against self incrimination. Benton did. Later he turned informer; and as a consequence of Cole's advice to Benton to do what the latter admittedly had a perfect and lawful right to do, Mr. Cole finds himself convicted on two counts of violating section 1503. [note] It is from that judgment of conviction that he appeals.

The basic and determinative question raised by this appeal is whether advice to claim the constitutional privilege, which advice does not have and was not designed to have any consequence in the way of influencing the witness to violate any of his duties as a witness or in the way of bringing about an effect upon the administration of justice that is undue, corrupt or unlawful, can be as a matter of law the crime defined by section 1503. It is the appellant's contention that there is not and cannot be any obstruction of justice within the meaning of that section when there is no endeavor or effort to get the witness to do anything wrong in relation to his duties as a witness. Every witness has the constitutional right to refuse to testify on grounds of possible self-incrimination; accordingly, he violates no duty as a witness when he invokes that right; and one who tries to influence or induce or persuade him to invoke it, therefore, does not endeavor to get the witness to do anything wrong."

The errors claimed are two: One, that the court erred in denying appellant's motion for an acquittal, and two, the evidence is insufficient to support the verdict of guilty.

Jurisdiction existed below, and appeal lies here. 28 U.S.C. §§ 1291 and 1294(1).

I—FACTS

The facts are many and complicated. Appellant's recital covers twenty-three pages of its brief; appellee's covers fifteen. The latter recital, slightly modified and corrected to be less argumentative, is attached hereto as Appendix A, and we adopt it as part of this opinion.

We note also it was stipulated that during all the times herein mentioned Cole knew he was under investigation by a grand jury for possible perjury and the obstruction of the due administration of justice.

II—ARGUMENT

Appellant first urges that §1503 has implicit in it a limitation of its literal language; that it cannot proscribe criminal acts consistent with the due administration of justice, such as influencing a witness to tell the truth. We agree. (That is not this case. Cole here never urged or advised Benton to tell the truth.) We likewise agree with appellant that "the limitation on the literal language of the statute must be that *only that is proscribed which produces or which is capable of producing an effect that prevents justice from being duly administered.*" (Emphasis, except as to the word "duly," is this court's. Appellant's Opening Brief, p. 28.)

Appellant then argues to us (and again we agree):

> "The constitutional privilege against self-incrimination is designed to protect the innocent as well as the guilty. It is an inalienable right that every witness has. It is, therefore, an important and integral part of the due administration of justice. A witness who claims it exercises only his constitutional right. When *he* does so, *he* does not, therefore, obstruct the due administration of justice or do anything contrary to his duties as a witness." (Emphasis added.)

Again, we concur emphatically. But it is from here on that this court parts company with appellant's argument. Appellant continues:

> "That being so, it cannot be a crime for one to advise or persuade him to do that which is lawful and his absolute right, and which, because of that fact, is not a corrupt or otherwise wrongful obstruction of the due administration of justice."

With that conclusion, we cannot agree. It neither necessarily nor logically follows. What the statute attempts to prohibit is the "endeavor . . . to influence . . . any witness" corruptly or by threats or force or by any threatening letter.

Many acts which are not in themselves unlawful, and which do not make the actor a criminal, may make another a criminal who sees that the innocent act is accomplished for a corrupt purpose, or by threat or by force.

If in a kidnapping for ransom case "X" hires or by force and/or threat requires a messenger boy to pick up a box containing the ransom money at a certain

spot and deliver it to the kidnapper, can the kidnapper escape liability for *his* corrupt act, by claiming it was lawful because the person he influenced was acting within his legal rights, and was himself innocent? Should either a despotic leader of a financially strong labor union, or an extremely successful manipulator in big business' operations on Wall Street, be permitted to effect the withholding of testimony in a court of law or before a grand jury which might aid in convicting him of some violation of law, by permitting him to pay any sum; or intimidate in any way, one to one hundred witnesses who might testify against him, and who themselves are not being investigated, because *they* have the right, individually, to invoke the Fifth Amendment when called upon to testify? Such a thesis is not morally, and in our opinion; not legally sound.

According to appellant's theory, no matter how much money one pays a witness not to testify before a grand jury—whether $1,000 or $100,000; nor how many witnesses are paid such sums, and no matter what threats or force are used, and no matter *how corrupt the purpose* which the payer of such money may have for urging the witness to claim *his* (the witness') Fifth Amendment right—is of no consequence. "Its exercise [that of the constitutional privilege] is lawful and effective *regardless of the inducing cause*." (Emphasis added. Opening Brief, p. 29.)

That the inducing cause is immaterial insofar as the witness is concerned, we affirm. That this lawfulness wipes out the criminality of the inducer, acting with corrupt motive, we cannot agree. It is the *witness'* privilege which our inspired Constitution protects and

which any person in our courts may invoke, whether he be upright citizen or foul criminal; not someone else's privilege to capture by force or threat or bribe; and thus be enabled to prostitute one of the great cornerstones of our freedom under law.

To hold otherwise, would obstruct the due administration of justice, and we refuse to so hold. The sacred right to guard against self-incrimination is not negotiable, any more than is virtue. It is an absolute personal right, and as appellant urges, truly inalienable, insofar as any attempt may be made to transfer it for or to the benefit of someone else.

Nor need we become involved here with "advice" to claim the privilege, whether given by attorney to client, doctor to patient, priest to penitent,—one spouse to another, or even the "honest" advice of one friend to another. The advice by the attorney relates to and is an exercise of the client's right; not the attorney's—the advice by the priest relates to and is an exercise of the penitent's right, not the priest's. Even the husband and wife's confidential privilege rests upon the theory the two are one in the eyes of the law. Whether, if such advice were corruptly given by attorney, priest or doctor, the policy of the law would uphold the privilege despite the resultant obstruction of the due administration of justice, we need not here decide. Suffice it to say, neither the attorney's nor the doctor's privilege, nor the privilege of one spouse, is absolute in all cases.

"If the claim of the privilege," urges appellant, "is not a wrongful obstruction of the due administration of justice, the giving of advice to claim it obviously cannot be." If by this, reference is had to honest,

uncorrupt, disinterested advice, we agree. If it is not, we do not agree, for reasons appearing above.

Appellant urges his position is supported by various cases, particularly *United States v. Herron*, N.D.Cal., 1928, 28 F.2d 423, as well as *Koster v. United States*, 2 Cir. 1926, 10 F.2d 675, 676; *Harrington v. United States*, 8 Cir. 1920, 267 Fed. 97; *Taran v. United States*, 8 Cir. 1959, 266 F.2d 561, 567. Only the first of these seems in point.

We do not read *Harrington v. United States, supra*, as contrary to our position here. There the court said, and properly so:

> "It is not an unlawful attempt to influence or impede a witness, or the due administration of justice, for one to seek to obtain from a witness a statement of the facts as he believes them to be, without the exercise of undue influence, even though such a statement may conflict with prior testimony given by the one making the statement. Such an effort is not regarded with favor, because of the temptation to influence the witness unduly; but the mere request for a statement *believed to be true* does not offend against the statute . . . *because it is not corrupt conduct.*" (Emphasis added. *Id.* at 101.)

Again, the court said:

> "[B]ut there was no evidence tending to show that Scattergood was consciously attempting to obtain a statement of a falsehood." (*Id.* at 104.)

Thus the intent or motive of the party charged as an inducer is of importance.[1]

[1] We note the conviction was reversed on errors in the admission of evidence, and other errors, not here matrial.

Taran v. United States, *supra*, involved the false statements as to arrests and convictions made by the defendant to the Minnesota Board of Pardons which induced that Board to grant him a pardon. He was convicted for his false statements, but his conviction was reversed, upon the ground that the jury could not make a collateral exploration into *why* the defendant was pardoned; that the deportation statute accords a pardon legal finality and conclusiveness. That case is inapplicable to the facts here present.

In *Rosner v. United States*, *supra*, the defendant was convicted, having been charged with advising another person to disregard a letter from a United States Attorney *requesting* that other person to plead to an information against him. Was such advice an attempt to obstruct the due administration of justice? It was not, said the Third Circuit, for:

> "[S]ince a disregard by the defendant of an oral request by the United States Attorney would not have been obstructing the due administration of justice, because justice is not administered that way, so advising Miller to disregard substantially the same request is not a violation of the statute."

The letter "was not process, nor is it specifically authorized by any statute of the United States." *Id.* at 676.)

That may well be sound law, but has no applicability here.

In *United States v. Herron*, *supra*, appellant presents a case whose facts and holding seem directly in point.

There, in the last two paragraphs of the opinion, Judge Lauderback stated:

> "The witness himself, therefore, is protected in his claim of privilege by being allowed the privilege, irrespective of his motive for claiming the same."

With this we agree. He then stated:

> "In this case the defendant Herron [the attorney] is charged with influencing, by advising, the witness Rasmussen to claim a lawful privilege, and I do not believe it is the law or the policy of the law to make criminal, no matter what the motive might have been, the advising of a witness to do that which was lawful and *would in fact* have protected the witness from disclosing self-incriminating matter." (*Id.* at 123. Emphasis by the court.)

Except for proof of the fact that the plea of privilege *would in fact* have protected the witness from self-incriminating matter,[2] the facts in *Herron* are similar to those here existing—for Herron was charged with a conspiracy to corruptly endeavor to influence and impede the due administration of justice, because Rasmussen's claim was alleged to have been made, "apparently, but not really, for his personal protection and . . . [was] for the purpose of corruptly giving shelter, behind the said privilege, to the said J. H. Madden and the said Hans Strittmatter, under the pretext of shielding the said witness Rasmussen." (*Id.* at 122.)

[2] The record here discloses (as set forth in full in the Appendix) no reason exists to believe the witness Benton would have incriminated himself had he answered the questions asked. They were but two in number: (1) "Were you ever an employee of Cole, Fischer & Rogow?" and (2) "Have you ever seen an individual named Joseph Stacher?" There is no showing the answer to either of these questions bore any relation to the Stein payments; or would otherwise incriminate Benton.

This case, of course, is not binding on this court, and we refuse to follow it for reasons heretofore stated.

We need not discuss the additional cases plaintiff cites that hold that a witness' motives for exercising his privilege are immaterial. We agree with them, on their facts. *United States v. Courtney*, 2 Cir. 1956, 236 F.2d 921. But see Judge Lumbard's dissent in *United States v. Courtney*, as well as his concurrence in *United States v. Gordon*, 2 Cir. 1956, 236 F.2d 916 (which is "to be read together" with the first *Courtney* case mentioned), and his reference to Judge Learned Hand's language in *United States v. St. Pierre*, 2 Cir. 1942, 132 F.2d 837, 840, that while the privilege of refusing to answer expresses recognition of the high value our democracy puts on the individual's right of privacy:

> "The result of using this, like any other privilege, is to deprive people of evidence which would be otherwise available; at best a disastrous necessity; . . ." (*Id.* at 840.)

Implicit in such reasoning is the requirement that there are needs on both sides of the privilege—one requiring its extension and one requiring its contraction. We here, in a case of apparent first impression, do not think it wise to render a valuable, proper and decent privilege a carte blanche license to be utilized "to influence, obstruct or impede"—not justice—but "the due administration of justice."

After oral argument, appellant's counsel submitted a letter (to which we permitted the government to reply) urging upon us (1) that the "jury . . . could not properly find that Cole's advice was given [to Benton] for some ulterior or self-serving motive, because no such question was submitted to the jury." (2) "The

record does not show that Cole had any reason to want to protect himself, or that Benton knew anything that Cole did not want him to testify to."

(1) Admittedly, the prosecution's theories (a) of Cole's threats (b) his advice to Benton to leave town, and (c) that the obstruction of due administration of justice took place by advice which was "unlawful if Cole went over the 'imaginary line' between asking Benton to take the Fifth, and 'insisting' or 'imploring' or 'demanding' that he do so," were all submitted to the jury. Nor can we agree that the jury was not instructed on Cole's motive. A reading of 18 U.S.C. § 1503 limits the acts proscribed to those done with a "corrupt" motive. The court instructed in the language of the statute; and emphasized that only *corrupt* methods were prohibited; that *corrupt* influence was the only influence proscribed;—that only "any act, committed *corruptly*," was to be considered. (Tr. pp. 920-922.) The court thoroughly instructed on the "specific intent" necessary to be found in a case such as this. (Tr. p. 918.)

(2) Nor is the record bare of evidence "of any reason" why Cole would want Benton not to testify. An inference could be drawn that Cole remembered both the statements that he had made to government agents and to the grand jury under oath, and the contradictory statements he had made to Benton as testified to by Benton at trial. The Cole statement to Benton that Stacher was the "number two man" in the syndicate, and he, Cole, was "Stacher's boy," is at variance with Cole's statement that his relationship with Stacher was purely a social one engendered by a friendship between their wives by reason of a "P.T.A. meeting;" and that there was no business relationship between the two men.

Further, Cole gave instructions to others, including his maid, to likewise claim the Fifth Amendment privilege before the grand jury. He influenced W. Jack Bernard and W. Levin to take the Fifth Amendment in other matters. He himself left town when the Attorney General of the United States was in town. He kept himself informed, at least after Benton's first appearance before the grand jury, as to when the grand jury was meeting and what, so he thought, the government "was interested in." We need not, and the jury did not need to know *why* Cole was interested in what the jury investigated, nor what it was he did not want brought up or testified about, nor need there be direct word of mouth testimony on these subjects. Inferences could well have been legitimately drawn by the jury that Cole wanted to keep the jury as far away as possible from any investigation of *any* relationship between Stacher and Cole.

III—CONCLUSION.

We hold the constitutional privilege against self incrimination is an integral part of the due administration of justice, designed to do and further justice, and to the exercise of which there is an absolute right in every witness. A witness violates no duty to claim it, but one who bribes, coerces, forces or threatens a witness to claim it, or advises with corrupt motive the witness to take it, can and does himself obstruct or influence the due administration of justice.

We hold there here existed evidence from which the trier of facts, the jury, could conclude such an obstruction of the due administration of justice had taken place, and that appellant had, corruptly, and by influence and threats and consideration paid, caused it.

Affirmed.

Appendix A

Statement of Facts

"During the spring of 1962, a Federal Grand Jury, sitting in Los Angeles, was engaged in the investigation of [one] Joseph 'Doc' Stacher, against whom deportation proceedings had previously been instituted, in an endeavor to determine whether he had obtained a secret interest in the Casino of the Sands Hotel, Las Vegas, Nevada [R. T. 135-136; 480-487; 500]. [n. 1, which we omit.]

The Appellant Marvin R. Cole [n. 2, which we omit], a friend and associate of Mr. Stacher's was subpoenaed to appear on April 20, 1962, before the Stacher Grand Jury [R. T. 212-223; 478-479; 486-487; 499; 504]. Prior to his appearance, Cole, the head of the advertising agency of Cole, Fischer & Rogow, Inc., and the advertising man for the Sands Hotel since 1953 [R. T. 502-505], had been interviewed on a number of occasions by agents of the Federal Bureau of Investigation in an effort to determine what Cole knew of Stacher's activities, and what was the nature of their association [R. T. 93, 487]. In answer to the agents' questions, Cole stated:

> 'I know him socially. His wife and my wife are very good friends, they belong to the same PTA. Occasionally I see him through that connection. That's all I know about him. I never had any dealings with him, any business dealings or association.' [R. T. 487.]

During his Grand Jury appearance on April 20, 1962, Cole was asked the same questions, and it is apparent from his discussion with his attorney, immediately pre-

ceding and subsequent to his appearance, that he gave the same answers [R. T. 487; 498].

Subsequently, a Grand Jury commenced investigating Cole for possibly perjury during his testimony before the Stacher Grand Jury [137-138].

The investigation of Stacher continued through June 7, 1962 [R. T. 130]. In May, 1962, the United States Attorney's Office contacted the witness Joel Benton by telephone to arrange for his Grand Jury appearance on June 7, 1962. Benton was informed that he personally was not the subject of the Grand Jury investigation. Benton then indicated that he would testify, and no subpoena would be necessary to obtain his attendance [R. T. 148-151; 433]. When Benton finished this conversation, he phoned Marvin Cole and told him what had just taken place. Cole said he would pick Benton up for lunch, so they could discuss the situation [R. T. 150-151].

The reason that Benton phoned Cole was that, for a number of years, he had been under Cole's instruction that Cole was to be notified whenever agents or officers of the Government contacted Benton.

Though Cole and Benton were not friends as such, and had not seen each other for a long time prior to Benton's call [R. T. 281; 378; 515; 573-574], they were acquainted because Cole had employed Benton as a copy writer and an account executive from the time Cole, Fischer & Rogow, Inc. opened in the Sands Reservation Office in late 1954, until June 1957, when a court order put a major client out of business [R. T. 142-143; 373; 506; 512]. During that period Benton had seen Stacher in Cole's private office on a number of oc-

casions—usually on Saturdays [R. T. 213], and Cole made a number of remarks to Benton that sharply conflicted with the statements he later gave to agents of the Federal Bureau of Investigation [R. T. 212-223]. On the first occasion that Benton saw Stacher in Cole's office, Cole introduced Benton to Stacher, and then, later asked Benton if he knew who Stacher was. When Benton said he didn't, Cole told him that Stacher was the 'No. 2 man' in the 'syndicate' and that he, Cole, was Stacher's 'boy.' [R. T. 217.]

On the same day that he received Benton's phone call, Cole and Irving Reiss, a former investigator for the New York Liquor Authority who became a business associate and a close friend of Cole [R. T. 43-49; 88-89], picked up Benton and drove to the Bantam Cock Restaurant on LaCienega Boulevard in Los Angeles [R. T. 151-153].

Once there, Cole informed Benton that he, Benton, had to take the Fifth Amendment [R. T. 153-154; 181]. Benton was reluctant to do so because of his job [R. T. 154]. Cole argued 'There is nothing to worry about on that score. Besides that, you know they have that other thing hanging over your head' [R. T. 154]. That 'other thing' was the Nate Stein matter[3] [R. T. 155-156].

[3]The Nate Stein matter was a club that Cole raised over Benton's head every time there was an indication that Benton might testify before the Grand Jury [R. T. 154; 191; 246-247; 271-272; 432]. In its simplest form, the Nate Stein matter concerned a false affidavit that Benton had submitted to the United States Senate Committee on Improper Activities in the Labor-Management Field (the McClellan Committee) on behalf of Nate Stein. In that affidavit Benton attested to the fact that he had received certain checks from the Teamsters Union for performing a truck survey for that Union, and he had shared the money with no one [R. T. 161-163; 168-169]. The affidavit was false [R. T. 156].

Benton then expressed a desire to call an attorney named Marshall Sevin for legal representation. Cole . . . [felt Benton should] use one of Cole's attorneys which he would arrange for; but Benton preferred to consult an attorney of his own [R. T. 154-155]. Cole acquiesced, but then . . . [told] Benton to keep Sevin uninformed concerning the details surrounding his appearance before the Grand Jury, urging that Sevin was to be retained merely to 'hold [Benton's] hand' in case something should occur during the Grand Jury appearance [R. T. 177]. Benton then called Sevin and made an appointment for the following afternoon [R. T. 177-178].

On the day following the first meeting at the Bantam Cock Restaurant, the second meeting [n. 4, which we omit] took place between Cole and his friend Reiss on the one hand, and Benton on the other. This second meeting . . . was held a few hours prior to Benton's conference with Marshall Sevin. . . . Again Cole and his companion Reiss picked Benton up at his office and drove him to the Bantam Cock. Again Cole informed Benton that he must take the Fifth Amendment. And again Cole urged Benton to keep his attorney, Marshall Sevin, uninformed [R. T. 179-181].

In fact, Stein brought four checks to Benton which were made out in Benton's name. Benton endorsed the checks, and turned them over to Stein. Benton had performed no survey and received no money from the checks [R. T. 155-158; 163-166]. At the time that Benton submitted the false affidavit to the McClellan Committee, he showed it to Marvin Cole because, even though he knew Stein and Cole disliked each other, he believed that they were associated together in some manner not involving the advertising agency [R. T. 175].

It would be proper for this Court to take judicial notice of the fact that on August 12, 1963, Stein filed a notice of appeal in this circuit, from his conviction for obstructing justice by inducing Joel Benton to submit the false affidavit on his behalf.

When lunch was finished, Cole and Reiss drove Benton to Marshall Sevin's office and left him there [R. T. 186]. Benton was a very frightened man when he entered his attorney's office [R. T. 194; 440]. 'His hands were shaking, his manner and appearance were one of great nervousness' [R. T. 429]. Benton was well aware of Cole's association with Stacher [R. T. 212-223]. . . . [T]hree weeks later . . . he came to the Government and asked for physical protection for his family and himself [R. T. 396; 401].

The conversation between Benton and Sevin took something over half an hour [R. T. 445] and was interrupted near the end by Cole who phoned into the office to find out why the conference wasn't finished [n. 5, which we omit]. Benton and Sevin went downstairs where Sevin entered Cole's car. . . . [R. T. 188-189]. Sevin told Cole that he didn't want Benton to take the Fifth Amendment [R. T. 190; 431]. Cole . . . [said]: 'No, he has got to take the Fifth Amendment' [R. T. 190]. He repeated this two or three times [R. T. 191], and then said they have something on him that would lead to an investigation [R. T. 191; 431]. Cole was referring to the Stein matter [R. T. 527]. In fact, but unbeknownst to Cole, . . . Sevin [knew] about the false affidavit [R. T. 437-438], and Sevin said that he saw no necessity for Benton's pleading the Fifth Amendment [R. T. 431].

> 'Mr. Cole again insisted that Benton take the Fifth Amendment. . . . [R. T. 432; 436.]
>
> 'He got white around the mouth, Marvin Cole got white around the mouth, his eyes looked—his eyes changed in their appearance and his voice rose from a conventional tone, it became louder, it rose in pitch and became louder.

> . . . He appeared to be worn. He appeared to be in a state of upset. He appeared to be very emotional about this, very tense, very excited. . . . His manner of speaking was not that of a person merely making suggestions or giving advice . . . his statements were not . . . in the form of questions as much as they were a manner of a demanding nature, they were urgent insistence. . . .' [R. T. 191-192; 434-436].

Marshall Sevin suddenly changed his position and told Benton that he should take the Fifth Amendment. In truth, Sevin received no new information from Cole, and never changed his mind about the course that Benton should follow, but after being in the car with Cole, he verbalized an opinion that he did not really hold [R. T. 438-439].

At that point Mr. Sevin advised Benton to leave the car and call the United States Attorney's Office to request a subpoena for June 7, 1962, since he had previously indicated that he was going to testify and was not going to do so [R. T. 433].

On June 7, 1962, Benton appeared and took the Fifth Amendment to the following questions:

> 'Q. Sir, will you please state your full name? A. Joel Robert Benton. Q. What is your business address? A. 9060 Santa Monica Boulevard. Q. Is that known as Space and Time, Inc.? A. Known as Space and Time Advertising, Inc. Q. Advertising, thank you. Were you ever an employee of a firm known as Cole, Fischer & Rogow? A. I claim the privilege given me by the Constitution of the United States, that I not be com-

pelled to testify against myself. I therefore respectfully decline to answer the same question.

Q. Mr. Benton, have you ever seen an individual named Joseph Stagher? A. I claim the privilege given me by the Constitution of the United States, that I not be compelled to testify against myself. I therefore respectfully decline to answer the question.

Q. Mr. Benton, is it your feeling that any question this Grand Jury might ask might have the tendency to incriminate you so that you will resort to the privilege? A. Again, I claim the privilege given me by the Constitution of the United States, that I not be compelled to testify against myself. I therefore respectfully decline to answer the question.

Mr. Farber: Thank you, Mr. Benton. That's all. [R. T. 136-137.]

Benton pleaded the Fifth Amendment solely because of the insistence of Marvin Cole that he do so [n: to which we omit], [if Sevin is to be believed]. [R. T. 226.]

Upon concluding his Grand Jury appearance, Benton left the Federal Building and drove directly to Frascati's Grill on Sunset Boulevard in Los Angeles. From there, pursuant to earlier instructions from Cole, he phoned him [R. T. 227-228]. A few minutes later Cole and Reiss arrived. Cole [asked] . . . Benton concerning the questions asked of him by the Grand Jury [R. T. 228]. When Benton mentioned that his attorney, Mr. Sevin had conversed with an Assistant United States Attorney but that he didn't know what was the topic of conversation, Cole directed Benton to

phone his attorney, Mr. Sevin, and determine what had been discussed. Benton did as he was told and reported back that the conversation was merely 'lawyer talk' [R. T. 228-230]. During the same meeting Cole maintained that he wanted to pay the attorney's fee incurred by Benton [R. T. 230], which he did a few days later by giving Benton a $100 bill [R. T. 205].

It was ten days or two weeks, after the meeting at Frascati's that Cole phoned Benton and informed him that he, Cole, and the 'boys' were getting out of Los Angeles for the duration of Attorney General Robert Kennedy's visit which was scheduled for the following week. [N. 7: . . . [T]he Attorney General did come to Los Angeles during the week of June 20, 1962 and Marvin Cole did leave and go to New York for that week [R. T. 607-608].] He suggested that Benton also, ". . . Take a little run out of town. . . ." [n.8, which we omit] [R. T. 232.]

On June 21, 1962, only two weeks after his Grand Jury appearance, Benton contacted the United States Attorney's Office, voluntarily came to the Federal Building and gave a sworn statement, part of which concerned the false affidavit submitted on behalf of Nate Stein [R. T. 396-397]. It was at this time that, as mentioned above, Benton requested protection be given his family and himself. He requested nothing else of the Government and nothing was promised [R. T. 401].

There was no contact by telephone, or otherwise, between Cole and Benton from the middle of June 1962 until October 9, 1962 [R. T. 398-399, 574]. On the latter date Benton, who was working with the Government, called Cole, under Governmental instructions, to

Cole wanted to know what qualified them to give Benton advice [R. T. 253]. He argued that Benton was a 'stand-up guy', and wouldn't get in any trouble if he kept his mouth shut.

> "Everybody is taking the Fifth Amendment." . . . "You think you have been under a little pressure." . . . "Everybody in my office, they have had down there to testify. They have all taken the Fifth." "Even the maid in my home. . . ." [R. T. 260].

He went on to inform Benton just how stupid he was to go down and tell the Grand Jury anything [R. T. 261]. He then told Benton of other witnesses that he had tampered with [R. T. 261].

> He pointed out that other people had had that idea and that fortunately he had been able to talk them out of it. He mentioned two cases in particular. One was Jack Bernard, head of Foods Plus, and the other was Jack Lewin, formerly president of Trans American Airlines. He told me that both of these men, and he said, "They are both important, as you know, big men," he said, "as a matter of fact, Jack Bernard was very indignant when we suggested to him that he take the Fifth Amendment. He wanted to answer certain questions, even though there were certain other questions which he did not want to answer, but he did definitely want to answer certain questions."
>
> He said also that the Government had expected that when Jack Lewin testified, that he would say definitely that Marvin Cole, that he knew that Marvin Cole had an undisclosed interest in the

Sands Hotel, and that is what the Government expected Jack Lewin would testify to.

"But Marvin said that after they talked with his, Marvin's attorney, they changed their mind on it, and Jack Lewin did not answer questions—I mean Jack Bernard did not answer questions as the Government expected he would answer, and Jack Lewin, instead of saying definitely that Marvin Cole did have an undisclosed interest in the Sands Hotel, changed it to say that he had heard that Marvin Cole did have an undisclosed interest in the Sands Hotel.

"Marvin Cole also mentioned a check which came about this same time, a check as I recall that he had given to Eddie Torres or that Eddie Torres had given to him. I don't recall which it was, but there was a $25,000 check, and the testimony on that was not forthcoming from either Jack Bernard or Jack Lewin, so nothing happened on that. He said that both Jack Lewin and Jack Bernard were mighty happy that they did not answer the questions put to them at the time they were to testify" [R. T. 261-263].

The entire meeting between Cole, his friend Reiss, and Benton took close to two hours [R. T. 638, 640]. Towards the end of the conversation, Benton protested that he didn't know what to do. Cole informed Benton he had already told him what to do, and in conclusion, in a loud, excited tone of voice, he threatened, "Now, don't forget this Joel . . . . if you do testify, you will lose your job." He mentioned Harry Karl's name and then promised, "I will see to it that if you do take the Fifth, you do not lose your job" [R. T. 632-633].

During the whole meeting Benton was wearing a concealed radio transmitter which was broadcasting to a receiver and a tape recorder under the control of Special Agent Hal Rassi [R. T. 252-623-624]. Because the tape was in large part unintelligible, it was not played for the jury [R. T. 59-63, 625-638]. But at the time Marvin Cole and Irving Reiss testified they knew the tape's failings, because they had previously heard it played [R. T. 34-35]. On the other hand, Benton, when he took the stand, knew only that he had worn a radio transmitter and recording had been made, but he did not know the contents of the tape or that it was unintelligible [R. T. 139-140, 273].

The final meeting between Cole, Reiss and Benton took place in the parking lot behind Benton's office building on October 17, 1962, the day before Benton's scheduled Grand Jury appearance [R. T. 269-270; 574]. It took place, at Cole's insistence, after the following events transpired [R. T. 270]: Subsequent to the meeting at the Bantam Cock on October 10, 1962, Cole, with Benton's reluctant approval, had phoned Ziffren to set up an appointment for Benton. Cole then phoned Benton to tell him of the appointment. During this conversation Benton told Cole that he wouldn't need Ziffren because he was definitely going to testify. Cole then requested that Benton call Ziffren and cancel the appointment, which Benton did [R. T. 263-264; 268-269]. Later Cole placed an urgent call to Benton to arrange a meeting, asserting that it was important for him to talk to Benton, and suggesting that they go for lunch. [n. 10, which we omit.] Benton agreed, but later changed the meeting place to the parking lot behind his building [R. T. 270] because agents of the

Federal Bureau of Investigation did not want him taking a ride with Cole [R. T. 413]. 'At approximately 12:30 P.M. Irving Reiss drove up with Cole sitting beside him [R. T. 270; 549]. Cole began the conversation by thanking Benton for calling Paul Ziffren and cancelling an appointment [R. T. 271].

Then, after displaying a subpoena issued to Irving Reiss and telling Benton that he would have company before the Grand Jury, Cole argued that Benton was very foolish to testify. Finally, he urged Benton to get in touch with Nate Stein. Benton answered that Stein had been in Benton's office a few days before. Cole exclaimed that Stein was a 'damn fool for coming to Benton's office, but that he ought to see him. He then warned Benton, 'Joel, even if you don't care about what happens to yourself, remember this, you have a lovely wife and family, and . . . you wouldn't want anything to happen to them, would you?' He added, 'Well, remember, Jimmie Hoffa's boys are mighty rough . . . I highly recommend you get in touch with Nate Stein right away.' He told Benton that Stein could be reached through May Skinner at the Sands Hotel office and, if not, for Benton to recontact him. Cole [R. T. 271-272].

The next day, October 18, 1962, Cole was indicted by a Federal Grand Jury for obstructing and attempting to obstruct the due administration of justice [C. T. 2].

Cole's defense at his trial was that Benton had a problem and all he, Cole, did was give Benton friendly advice [R. T. 33-108; 501-600; 703-800]."

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
1. *Background*	2
2. *The first grand jury (Count I)*	4
3. *The second grand jury (Count II)*	8
4. *The instructions*	10
Argument	11
Conclusion	14

CITATIONS

Cases:	
Brown v. *Walker*, 161 U.S. 591	11
Catrino v. *United States*, 176 F. 2d 884	12
Grunewald v. *United States*, 353 U.S. 391	13
Rosner v. *United States*, 10 F. 2d 675	13, 14
United States v. *Grunewald*, 233 F. 2d 556	13
United States v. *Herron*, 28 F. 2d 122	14
United States v. *Polakoff*, 121 F. 2d 333, certiorari denied, 314 U.S. 626	12
United States v. *Russell*, 255 U.S. 138	12
Statute: 18 U.S.C. 1503	11, 12

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1002

MARVIN R. COLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Vol. I, 82–102; Pet. App. 1–27) is not yet reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1964 (Vol. I, 82, 103). The petition for

[1] The record consists of nine volumes. Volumes 2 through 8, which are consecutively paginated, constituted the reporter's transcript of the trial and are referred to as "Tr." Volume I, which is separately paginated, contains assorted papers filed in the district court and the proceedings in the court of appeals, and is referred to as "Vol. I". Assorted government exhibits, which are on file with the Clerk of this Court, are referred to as "G. Ex."

a writ of certiorari was filed on April 14, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether one who demands that a witness before a grand jury invoke the privilege against self-incrimination and issues threats to that end may properly be convicted of obstructing justice under 18 U.S.C. 1503.

STATEMENT

A two-count indictment returned in the United States District Court for the Southern District of California charged petitioner with obstructing justice by corruptly endeavoring to influence and corruptly influencing and intimidating one Joel Benton, in connection with Benton's testimony before a federal grand jury, in violation of 18 U.S.C. 1503 (Vol. I, 2–3). After a trial by jury, petitioner was found guilty as charged (Tr. 960–962). On June 12, 1963, petitioner received concurrent fines of $1,000 on each count (Tr. 1035). On appeal, the conviction was unanimously affirmed (Vol. I, 82–102, 103).

The evidence may be summarized as follows:

1. *Background.* In 1955, petitioner, who was a director and officer of the advertising firm of Cole, Fischer & Rogow, hired Joel Benton as a copywriter and account executive at the firm's Beverly Hills, California, office, which petitioner managed (Tr. 141–143, 276, 503, 512). Benton worked there until mid-June 1957 (Tr. 142, 144–145, 276, 377, 378–381, 512). During this period, petitioner introduced Benton to one Joseph "Doc" Stacher and one Nate Stein (Tr.

164, 211–212). Petitioner told Benton that Stacher was the "No. 2 man in the syndicate" and that he, petitioner, was Stacher's "boy" (Tr. 217).[2] Stein and, to a lesser extent, Stacher visited the Beverly Hills office while Benton was employed there (Tr. 164–166, 174–175, 212–213, 279–280).

In late 1955 or early 1956, Benton, as a favor to Stein, endorsed four Teamsters' Union checks aggregating $4,400 made payable to Benton, and returned the checks to Stein (Tr. 155–158, 283, 324, 329, 352–353; see Tr. 159–162). Benton did not receive any of the proceeds from the checks.

In early 1958—after Benton had left Cole, Fischer & Rogow—Stein told Benton that a "full scale" investigation of James Hoffa and the Teamsters' Union was under way; that Benton might be contacted by the government with reference to the checks he had endorsed; and that, if contacted, Benton was to communicate with Stein through a third party (Tr. 313, 315, 329–330). Subsequently, an investigator from the General Accounting Office interviewed Benton regarding the four checks and his association with Stein. Pursuant to instructions from Stein, Benton, in a letter of June 6, 1958, to the investigator, said that he had received the money for services rendered in conducting a "truck survey" in California (*i.e.*, counting the number of trucks traveling between Los Angeles and San Francisco on particular days) and for developing a "TV idea" for use by the Teamsters'

[2] Petitioner did not indicate what he meant by the word "syndicate" (Tr. 217–218).

Union in connection with a radio or television show (Tr. 167–169, 311, 317–319, 321, 332–333, 335–337, 354–360). When Benton showed petitioner a copy of this letter, petitioner became "agitated" and said that Stein was a fool and that no one would believe that story (Tr. 168, 282, 344–345). Petitioner told Benton that he should contact petitioner in the event that government agents came around again (Tr. 421). After consulting with Stein, Benton submitted an affidavit dated June 27, 1958, to the Senate Select Committee on Improper Activities (the "McClellan Committee"), in which Benton related the same story contained in the letter of June 8 (Tr. 158–161, 361; G. Ex. 3). The affidavit was false because Benton had not made the truck surveys (Tr. 155–156, 163, 166, 168, 349, 352, 361; see Tr. 437–438) and had not personally received the money.

2. *The first grand jury (Count I).* In the spring of 1962, a federal grand jury, sitting in Los Angeles, commenced an investigation of Stacher's possible undisclosed ownership interest in the Sands Hotel, in Las Vegas, Nevada (Tr. 135–136, 560). Petitioner, who had previously told the F.B.I. that he knew Stacher only on a social basis (Tr. 487), apparently gave the grand jury the same account (Tr. 448, 450, 487, 498).

On May 27 or 28, 1962, Benton received a message indicating that Assistant United States Attorney Benjamin Farber had telephoned him (Tr. 148, 387; see Tr. 614–615). Benton reported this to petitioner (Tr. 148–151, 387), who told Benton not to worry, and

that they would discuss the matter after Benton talked to Farber (Tr. 149, 151, 387). When Benton returned the call, Farber requested Benton to come on June 7 to answer a few questions before the grand jury and told him that while he could not state what the investigation was about, Benton was not personally the subject of the investigation (Tr. 149). Benton agreed to appear (Tr. 150, 233).

Shortly thereafter, Benton telephoned petitioner (Tr. 150–151). When Benton said that he was going to be subpoenaed for June 7, petitioner replied that that was the last day the grand jury would be in session before they recessed for the summertime and suggested that Benton "take a vacation" so that he would not be there on the 7th (Tr. 233). Later that day at a meeting of petitioner, Benton and one Irving Reiss, petitioner told Benton that there was nothing to be concerned about, that all Benton had to do was to take the Fifth Amendment (Tr. 151, 153–154). When Benton said that he was afraid of what his employers might think if he took that course of action, petitioner replied that there was "nothing to worry about on that score", and that the government had "that other thing" hanging over his head (Tr. 154). (This referred to the false affidavit submitted to the McClellan Committee (Tr. 155–166).) When Benton expressed a desire to call an attorney named Marshall Sevin, petitioner told him that there was no need to tell Sevin all the details concerning his grand jury appearance, that Sevin should be retained to more or less "hold [Benton's] hand and be there in case something should happen" (Tr. 177, 392).

On the following day, petitioner told Benton that he "must take the Fifth Amendment" (Tr. 181, 183). He said that Benton would have "plenty of company" before the grand jury inasmuch as four or five of the "boys"—who were identified by name—would be there (Tr. 185). Petitioner gave Benton a slip of paper containing the phraseology for invoking the Fifth Amendment, stating that Benton should copy the words in his own handwriting and memorize them (Tr. 182–184). Petitioner and Reiss then drove Benton to his meeting with Sevin, the attorney (Tr. 186). After Benton had conferred with Sevin for about half an hour, petitioner telephoned Benton at Sevin's office, inquired whether the conference was concluded, and said that he would pick up Benton in a few minutes (Tr. 187, 430).

Shortly thereafter, Benton and Sevin left the building, and when petitioner and Reiss drove up, they entered petitioner's automobile (R. 188–189, 430–431, 437). Sevin, who had been told by Benton of the false affidavit (Tr. 437–438), said that he saw no reason why Benton should invoke the Fifth Amendment before the grand jury (Tr. 190, 431–432). Petitioner replied, "No, he has got to take the Fifth Amendment" (Tr. 190, 393–394, 432), and added that there was "something that they have got that makes it absolutely imperative for him to go down there and take the Fifth Amendment" (Tr. 191, 192, 394, 432). When Sevin repeated his opinion, petitioner raised his voice and said, "He has absolutely got to take the Fifth Amendment, he has no other choice" (Tr.

191–192, 436). Sevin testified that petitioner's manner of speaking was not that of a person merely making suggestions or giving advice; that his statements were not "in the form of questions as much as they were a manner of a demanding nature, they were urgent insistence" (Tr. 436). Benton testified that he had never before seen petitioner in such a condition, and that he was "frightened" (Tr. 194, 207–208). Sevin then told Benton that the "boys" were "right", that he saw their "point", and that Benton had better take the Fifth (Tr. 192, 395).[3]

On May 31, 1962, a subpoena was issued to Benton, directing him to appear and testify before the grand jury on June 7, 1962 (Tr. 234–235, 614–615; G. Ex. 4). On that date, Benton appeared before the grand jury and invoked the Fifth Amendment to questions whether he was ever an employee of Cole, Fischer & Rogow and whether he had ever seen an individual named Joseph Stacher (Tr. 136–137, 223; G. Ex. 2). After invoking the Fifth Amendment to another question, Benton was excused. Benton testified that he pleaded the Fifth Amendment because of the "insistence" of petitioner that he do so (Tr. 226).

After leaving the Federal Building, Benton telephoned petitioner (Tr. 227–228) who arrived with Reiss a few minutes later. Benton told petitioner what questions had been asked and the answers he had given (Tr. 228). Petitioner said that he wanted

[3] Sevin testified that, while he never changed his mind about the course that Benton should follow, he nevertheless "verbalized" an opinion that he did not actually hold (Tr. 438–439).

to take care of Sevin's fee, that Benton should pay Sevin by check, and that petitioner would reimburse Benton (Tr. 230; see Tr. 232). Later, Benton paid Sevin's fee of $100, and petitioner gave Benton a $100 bill (Tr. 231, 265, 396–397, 442).

On June 21, 1962, Benton voluntarily contacted government agents and gave them a sworn statement, part of which concerned the false affidavit submitted on behalf of Stein (Tr. 234, 236, 239–240, 396–397). No promises or inducements were made to Benton (Tr. 401).

3. *The second grand jury* (*Count II*). In July 1962, another federal grand jury commenced an investigation of petitioner for possible perjury and obstruction of justice before the first grand jury (Tr. 123–125, 137–138; G. Ex. 2). Petitioner knew that he was being investigated by the grand jury (Tr. 123–125; see Tr. 112–113). On October 9, 1962, Benton was subpoenaed to appear before that body on October 18, 1962 (Tr. 235–236; G. Ex. 5).

Shortly thereafter, Benton telephoned petitioner at the request of an Assistant United States Attorney and informed him that he had received a subpoena to appear on October 18 before the grand jury (Tr. 240, 244, 251, 399). No government agent made any suggestions as to what Benton was to talk about, and the conversation was recorded with Benton's knowledge and consent (Tr. 251, 399, 406–409, 622–623; G. Ex 7). Benton told petitioner that he thought that he would go down and testify. When Benton said that on his first appearance he was questioned only

about petitioner, Stacher and others, and that he believed that the inquiry would not go beyond that, petitioner replied, "No, this time is different. This time it's on the union thing, kid. They are hammering away on that pretty good I understand. All over the country. That's where you have got a problem" (Tr. 247; G. Ex. 7). Petitioner said that Benton should not contact Sevin "yet", and arranged to telephone him later.

On the following day, petitioner and Reiss picked up Benton, who had a radio transmitter concealed on his person, and the trio drove to the Bantam Cock Restaurant (Tr. 252–253, 623–624). Petitioner asked Benton where he received "such a silly idea as not to go down and take the Fifth", stating that that was "foolish", and Benton "must go down and take the Fifth" (Tr. 253). Petitioner said that the only way Benton could get himself into any "trouble" was by testifying, that everything would be "all right" if he kept his "mouth shut," and that everyone in his office and even his maid had taken the Fifth (Tr. 260). Petitioner then told Benton that he would be "stupid" not to take the Fifth, pointing out that other individuals had had the idea of testifying but that "fortunately he [petitioner] had been able to talk them out of it" (Tr. 261–262). Petitioner said that Benton should talk to a "good attorney" before making up his mind (Tr. 263). When Benton said that he had Sevin in mind, petitioner replied, "No, I don't mean like Marshall Sevin. I mean a real heavyweight, what you need is a real heavyweight"

(Tr. 263). Petitioner then suggested the name of an attorney, stating that he would arrange an appointment. When Reiss said that the attorney was "too high-priced", petitioner replied, "Don't worry about that, we will take care of it" (Tr. 264, 404, 406). In an "excited and loud" tone of voice, petitioner said, "Now, don't forget this, Joel, * * * if you do testify you will lose your job" (Tr. 261, 657, 658, 632–633). He also said, "I will see to it that if you do take the Fifth, you do not lose your job" (Tr. 261, 632–633, 657, 658).

On October 17, 1962—the day before Benton's scheduled grand jury appearance—petitioner telephoned Benton and arranged to meet him that day. At about 12:30 p.m., petitioner and Reiss drove up to a parking lot and met Benton (Tr. 269–270, 549). Petitioner told Benton that he "most assuredly" would lose his job if he testified; that he should discuss the situation with Nate Stein before doing "something foolish"; and that no one would believe him (Tr. 271). Petitioner then said, "Joel, even if you don't care about what happens to yourself, remember this, you have got a lovely wife and family, and * * * you wouldn't want anything to happen to them, would you?" (Tr. 272). When Benton replied in the negative, petitioner added, "Well, remember, Jimmie Hoffa's boys are mighty rough" (Tr. 272). On the following day, the grand jury returned the instant indictment.

4. *The instructions.* In its instructions to the jury, the district court charged that Benton had the right

to invoke the Fifth Amendment before the grand jury; that petitioner did not request Benton to do something illegal; and that the petitioner had the right to advise and perhaps argue that Benton should take the Fifth Amendment (Tr. 932). The court also charged, in part (Tr. 934):

> This would be a comparatively easy case if the government had been able to prove that Benton was asked to do something illegal, but because Benton was asked to do something that was not illegal, you have to find not only that the request was made, but it was made in such a way that it was more than a request, that it was a demand, that it was an insistence, that the defendant did something that he was not entitled to do.

ARGUMENT

1. Petitioner's contention that his conduct in this case could not have constituted an obstruction of justice of the sort prohibited by 18 U.S.C. 1503 because the witness was constitutionally entitled to claim the privilege against self-incrimination is without merit. The constitutional privilege against self-incrimination protects a witness against being compelled to provide answers which might reasonably tend to incriminate him, but it may not be used "as a pretext for securing immunity to others." *Brown* v. *Walker*, 161 U.S. 591, 597, 600. The effect of invoking the privilege is to foreclose a line of inquiry; hence the result of an improper resort to the privilege is as harmful to the due administration of justice as if the witness were forcibly or fraudulently prevented from

appearing before the grand jury. There is, for example, no practical difference between bribing a prospective witness to flee the jurisdiction and bribing him to invoke an available privilege against self-incrimination which he would not otherwise claim. Either action obstructs the proper administration of justice, and both are covered by the inclusive language of the governing statute.[1] Nor should there be any difference between the payment of a bribe to induce a witness to claim the privilege against self-incrimination and what this record discloses—*i.e.*, the use of threats or other coercive measures to compel a witness to invoke this privilege of silence, despite his expressed intention, buttressed by advice of counsel, not to claim it. Consequently, although the witness might personally invoke the privilege, it is unlawful for a third party to coerce or induce him to claim it for the protection of the third party.

2. The district court charged (Tr. 932–934), that one does not violate 18 U.S.C. 1503 by recommending or advising that a witness invoke his constitutional privilege against self-incrimination. The jury, under the judge's charge, found that petitioner's acts went beyond mere advice and that they amounted to threats or coercion done with corrupt motive. There was, as

[1] It has been said that 18 U.S.C. 1503 prohibits any one of the "variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined." *Catrino* v. *United States*, 176 F. 2d 884, 887 (C.A. 9). See also *United States* v. *Russell*, 255 U.S. 138; *United States* v. *Polakoff*, 121 F. 2d 333, 334 (C.A. 2), certiorari denied, 314 U.S. 626.

the court of appeals concluded, substantial evidence from which the jury could infer that petitioner's motive was to prevent "any investigation of any relationship between Stacher and Cole" (Pet. App. 14), and not to protection Benton's constitutional rights. That such conduct violates the statute was settled by this Court's opinion in *Grunewald* v. *United States*, 353 U.S. 391, 424, when it said:

> Finally, we find no substance to Halperin's contention that he was in effect convicted for advising, as a lawyer, some of the witnesses before the grand jury that they had a right to plead their Fifth Amendment privilege. The evidence against Halperin under these Counts was quite sufficient to make out a case for submission to the jury.

See the discussion of this point in the court of appeals' opinion in *United States* v. *Grunewald*, 233 F. 2d 556, 570–571 (C.A. 2).

3. Contrary to petitioner's assertion (Pet. 19–21), the decision of the court of appeals does not conflict with *Rosner* v. *United States*, 10 F. 2d 675 (C.A. 2), where it was held that it is not an obstruction of justice to advise a defendant in a criminal case to disregard a letter written by a prosecutor requesting the defendant to appear in court. In *United States* v. *Polakoff*, note 4, *supra*, the Second Circuit limited *Rosner* to its special facts, the court noting that "since a mere request by the prosecutor that an accused appear could be disregarded as not compulsory process, advice to that end was not illegal." 121 F. 2d at 335. In the instant case, on the other hand, cor-

rupt methods were employed by petitioner to induce another to make certain statements while under oath and in the course of a lawful grand jury investigation. Hence it cannot be said here, as it was in *Rosner*, that petitioner's acts did not concern any part of the lawful "administration" of justice.

CONCLUSION

For the reasons set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

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MAY 1964

United States v. *Herron*, 28 F. 2d 122, was a district court case in the Northern District of California and if applicable was overruled by the opinion below.

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IN THE

Supreme Court of the United States

October Term, 1963
No. 1002

MARVIN R. COLE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Brief for Petitioner in Reply to Brief for the United States in Opposition.

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SUBJECT INDEX

	Page
Preliminary statement	1
Argument	2
I.	
Advice to claim a constitutional right is not obstructive conduct	2
II.	
The decision below conflicts with Rosner v. U. S.	5
Conclusion	7

TABLE OF AUTHORITIES CITED

Cases	Page
Bridges v. Superior Court, 314 U. S. 252	3
Brotherhood of Railroad Trainmen v. Virginia, (April 20, 1964) ... U. S. ... [Oct. Term 1963, No. 34]	5
Brown v. Walker, 161 U. S. 591	2
Grunewald v. United States, 353 U. S. 391	3, 5
Hamilton Shoe Co. v. Wolf Brothers, 240 U. S. 251	2
Magnum Import Co. v. Coty, 262 U. S. 159	2
Rosner v. United States, 10 F. 2d 675	5, 6
Shapiro v. United States, 335 U. S. 1	7
Shendal v. United States, 312 F. 2d 564	2
United States v. Constantine, 296 U. S. 287	7
United States v. Courtney, 236 F. 2d 921	2
United States v. Herron, 28 F. 2d 122	7
United States v. Polakoff, 121 F. 2d 333	6
Miscellaneous	
Senate Report No. 225, 79th Congress, 1st Session	4
Statutes	
Act of March 2, 1831, c. 99, 4 Stat. 487	3
Act of March 2, 1831, Sec. 2, 4 Stat. 488	4
Textbook	
Gales & Seaton's Register of Debates in Congress, pp. 3, 561	3

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Brief for Petitioner in Reply to Brief for the United States in Opposition.

Preliminary Statement.

This reply to the Government's Brief in Opposition is presented because of the Government's failure to meet head on, or even to discuss, the grounds upon which the writ of certiorari is sought. Instead of such a discussion the Government offers only a question-begging, non-responsive argument on the substantive merits of the questions tendered by the petitioner, designed apparently, to show that the court below did not err. We deem it advisable not to let that argument go unchallenged, notwithstanding that the Bar has been told many times by this Court that certiorari is granted, not necessarily because the court below was wrong but because of the public importance of the question decided, or of the necessity for preserving uniformity of decision. [*Hamilton Shoe Co. v. Wolf Brothers*, 240

U.S. 251, 257-258, and cases there cited; *Magnum Import Co. v. Coty*, 262 U.S. 159, 162-163.] Be that as it may, the opposition argument at least shows that the question is a substantial and important one upon which this court ought to speak.

ARGUMENT.

I

Advice to Claim a Constitutional Right Is Not Obstructive Conduct.

1. The question here is whether advice to a potential grand-jury witness to claim his privilege against self-incrimination, is an obstruction of the due administration of justice if, *ex hypothesi*, the advice is offered in the self-interest of the advisor or accompanied by threats. To answer that question obviously takes something more than merely to transform it into a declarative statement. So to beg the question adds nothing to the argument. In essence, however, that is all that the Government's discussion amounts to.* [See, *Gov. Br.* 11-12, par. 1.]

2. If, as is undenied in this case, the claim of privilege by the witness was a lawful one, and, if, as is the law, his motives or reasons for making the claim are immaterial [*United States v. Courtney*, 2 Cir., 236 F. 2d 921, 923; *Shendal v. United States*, 9 Cir., 312 F. 2d 564, 565], it is necessary, to uphold the Government's position, to accept either of two hypotheses. Those hypotheses are, first, that the claim of the privilege, even though a lawful one, is *ex proprio vigore*

Brown v. Walker, 161 U. S. 591 had nothing whatever to do with a claim of privilege to protect another. The Government's characterizations of the case [Gov. Br., 11] is an overstatement.

an obstruction of the due administration of justice; or, second, that the proscriptive statute penalizes not merely the end result of obstructing justice but, as well, and regardless of result, the means by which it is endeavored to bring the obstructive result about.

The first of these hypotheses cannot be seriously considered. So important a part of our legal system is the privilege that, as Mr. Justice Black concurring in *Grunewald v. United States*, 353 U.S. 391, 426, said, the Founding Fathers deemed it "worthy of enshrinement in the Constitution . . ." It is a fundamental part of the due administration of justice. Resort to it, therefore, cannot be an obstruction. [See, the cases cited at page 17 of the *Petition*.]

The second hypothesis cannot be accepted in the face of the statute's history and its evident purpose. The statute is a direct descendant of the Act of March 2, 1831, c.99, 4 Stat. 487. That Act, as is well known, was inspired by the desire to limit the power of judges to punish summarily, as a contempt, obstructions of the court's proceedings taking place out of the presence of the court. [See, *Bridges v. Superior Court*, 314 U.S. 252, 287-288.] The abuse of the contempt power by Judge Peck in summarily convicting a newspaper publisher who had criticized one of the judge's decisions led to his impeachment, and, in the same session of Congress that tried the impeachment [*Gales & Seaton's Register of Debates in Congress*, pp. 3, 561], to the Act of March 2, 1831. The Congress was concerened with the effect upon the administration of justice not with the means by which that effect was produced. In other words, it was concerned with the kind of acts that would be a contempt of court;

acts which, if committed out of the court's presence, it was desired to make punishable only after a plenary trial. Attention was centered on obstructions of the court's proceedings, not on the method of accomplishing an obstruction.

To this history there should be added the language of the statute, its evident purpose, and the national government's traditional abstention from penalizing merely wrongful conduct of a sort that the States are fully equipped to handle. Taken all together, the conclusion follows that the statute must be read as not penalizing the means of effecting an obstruction of justice, but only the result of obstruction. That argument has gone completely unnoticed by the Government.

3. The legislative history has one other item of significance to add in this connection. As originally enacted, the statute penalized the endeavor "to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the *discharge of his duty* . . ." [Act of March 2, 1831, §2, 4 Stat. 488. Italics ours.] With the italicized phrase in the statute, it is clear that what was aimed at, as we said in our Petition, pp. 16-17, was "some act by a witness that is contrary to the witness's duties as a witness . . ." The phrase is no longer in the statute. It was eliminated, however, only because in 1945 the Attorney-General, recommending some additions to the statute not material here, pointed out that the phrase about discharge of duty "appears to be surplusage and should be stricken." [*Senate Report No. 225*, 79th Congress, 1st Session.] Obviously, it was felt that elimination of the phrase would not change the statute's meaning.

4. The question here involved was not decided in *Grunewald v. United States, supra*, 353 U.S. at 424. [Gov. Br. 12-13.] What was decided, and all that the Government contended, in that case, was that since there was ample evidence to sustain the finding that the lawyer-defendant had attempted to get a witness to give false and manufactured testimony, it was idle to argue that the attempt was only a lawyer's advice to plead the self-incrimination privilege.*

5. Since the Petition was filed, this Court has decided *Brotherhood of Railroad Trainmen v. Virginia*, (April 20, 1964) ..... U.S. ..... [Oct. Term 1963, No. 34], in which it was held that advice to retain a certain lawyer was speech protected by the First Amendment. It is fairly arguable that the advice involved in the case at bar is similarly protected. That should be a weighty consideration in determining whether the statute here in question may be interpreted as proscribing such advice.

II

The Decision Below Conflicts With Rosner v. U. S.

1. The assertion that the decision below does not conflict with *Rosner v. United States*, 2 Cir., 10 F. 2d 675 [*Gov. Br.*, 13-14] misconceives the respect in which that conflict exists. [See, *Petition* 19-21.] *Rosner* decided that advising a defendant in a criminal

*Point III in the Government's Brief in this Court in *Grunewald* [Oct. Term 1956, No. 184] makes this very plain. It was there said: ". . . it is clear that the issue is not whether the verdict could rest on petitioner's advice to the witness as a lawyer to refuse to answer questions on the ground that the Fifth Amendment protected him. The verdict rested on a finding that petitioner intended to impede justice by influencing a witness not to tell the truth."

case not to respond to a non-obligatory request from a United States attorney to appear before a Federal court, was not a violation of the obstruction statute. That request, the court reasoned, was not process and the defendant was not obliged to heed it. Ignoring it, therefore, was not wrongful or unlawful. Advising one to do an act not wrongful or unlawful in respect of the administration of justice, was not obstructive. In the instant case, however, it was one of the government's theories that advice to take a vacation, given to one who had been orally requested by a United States Attorney to appear before a Federal grand jury, was obstructive. [*Petition*, Appendix "B", pp. 13, 22.] Had the rationale and holding of *Rosner* been applied, the holding in the case at bar would have had to be the opposite of what it was. In this respect, the two decisions are in direct conflict.

2. To say that *Rosner* was limited in *United States v. Polakoff*, 121 F. 2d 333, is seriously to overstate what was done in the latter case. What was done in respect of *Rosner*, and all that was done, was to distinguish it on the ground that it held that "since a mere request by the prosecutor that an accused appear could be disregarded as not compulsory, advice to that end was not illegal . . .", whereas the question in the *Polakoff* case was whether a fraudulent attempt to influence a prosecutor was a "corrupt" endeavor to influence any . . . officer . . ."

The scope and vitality of *Rosner* on its facts, and, therefore, as a precedent for similar or analogous facts, were left wholly unimpaired. And even if it be assumed that it was limited to its special facts, *i.e.*, as the *Polakoff* court said, to the fact of advice to disre-

gard a non-compulsory request to appear, that is the fact in the case at bar that relates to the government's "take a vacation" theory.

3. To be sure, the Court of Appeals refused to follow the decision of the District Court for the Northern District Court of California in *United States v. Herron*, 28 F. 2d 122. The fact that to decide our case it was necessary to disregard a factually identical, even though non-binding, Federal decision shows the importance of the question, and the necessity for an authoritative ruling by this Court. [See, *United States v. Constantine*, 296 U.S. 287, 290; *Shapiro v. United States*, 335 U.S. 1, 4.]

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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